NO. 784

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GUY N. STOCKSLAGER,
Plaintiff in Error

vs.

THE UNITED STATES OF AMERICA
Defendant in Error

No. 784

Brief of Plaintiff in Error

KEY. PITTMAN,
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UPON WRIT OF ERROR TO THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, SECOND DIVISION

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STATEMENT OF FACTS

The writ of error in the case was sued out, to the District Court of Alaska, Second Division, at Nome, to review the proceedings, resulting in the conviction and sentence of Guy N. Stockslager, plaintiff in error, for the crime of forgery, alleged in the indictment to have been committed on the 28th day of July, 1901, by said Stockslager, in willfully, knowingly and feloniously uttering and publishing as true and genuine to one Frank Johnson, a certain false and forged writing and check, purporting to be the check of one Cabell Whitehead. (Tr. p. 4.)

On the 10th day of October, 1901, Guy N. Stockslager had his trial, resulting in a verdict of guilty on said day, with the jury's strong recommendation to mercy. (Tr. pp. 13-17.) A new trial having been denied, and the motion in arrest of judgment overruled, a sentence to three years' imprisonment was rendered on the 21st day of October, 1901. (Tr. pp. 19-20.)

The day subsequent to the alleged forgery, to wit, on the 29th day of July, 1901, the plaintiff in error was arrested and placed in jail, where he remained continuously until the day of the trial. (Tr. p. 55, tes. of Stock.) And although the record is silent, the Court may infer that the plaintiff in error was held to answer before the Grand Jury, as said plaintiff in error could not have been detained in custody so long, without a preliminary hearing, and he was not indicted by the Grand Jury, until the 5th day of October, 1901. (Tr. p. 7.)

On the 5th day of July, 1901, Judge Arthur H. Noyes, District Judge for Alaska, for the Second Division, finding it "necessary to hold a special term thereof for the discharge of the business of a distant portion of the district," directed that a special term of said court be held at Unalaska in said district, and that the necessary notice thereof be given. (Tr. p. 38.)

Notice of the time and place of holding said special term was given. (Tr. p. 39.) On the 19th day of August, 1901, the Honorable James Wickersham, District Judge for the District of Alaska, for the Third Division, appeared at Unalaska, and convened said special August term so-called for Unalaska. On the 16th day of August, 1901, Judge Wickersham ordered a Grand Jury drawn for said special term of court at Unalaska. (Tr. p. 43.) From the minutes of said court it appears that a Grand Jury for said special term at Unalaska was

impaneled and sworn on the 19th day of August, 1901. (Tr. pp. 44-45.)

On the 10th day of September, 1901, at Unalaska, Judge Wickersham made an order adjourning said special term at Unalaska, until the 16th day of September, 1901, at 10 o'clock in the forenoon to be held at Nome. This order was filed in the office of the Clerk of said court on the 10th day of September, 1901, at Unalaska. (Tr. p. 45.)

At Nome, Alaska, on the 21st day of September, 1901, Judge Wickersham made an order, commanding the drawing of the names of twenty-three persons to "serve as Grand Jurors at the special August term (1901) of said court to be holden at Nome, Alaska, on the 23rd day of September, 1901." (Tr. p. 46.)

On the 24th day of September, 1901, the Grand Jury ordered drawn on the 21st day of September, 1901, was impaneled, sworn and instructed by the Court. (Tr. pp. 47-48.)

On the 30th day of September, 1901, the indictment was found by said Grand Jury impaneled on the 24th day of September, 1901. (Tr. pp. 7-8.) On the 5th day of October, 1901, said indictment was presented to said Court, endorsed, "A True Bill." (Tr. p. 6.)

Subsequent to the arraignment, and prior to defendant's plea to the indictment, to wit, on the 8th day of October, 1901, the prisoner's counsel moved to quash the said indictment on the grounds that no legal term of said court, either regular or special, existed or had been convened, at the time when said Grand Jury was ordered drawn, or at the time when said Grand Jury was drawn, or at the time the venire issued, or at the time when said Grand Jury was impaneled and sworn, or at the time when said indictment was found, or at the time when said indictment was presented and filed. (Tr. pp. 34-35.) Said motion

to quash was overruled forthwith and immediately thereafter on the same day. (Tr. p. 9.)

Immediately after said motion to quash was overruled, and on the same day, the prisoner, by his counsel, demurred to said indictment, on the grounds 1st. That said indictment did not conform to the requirements of Ch. 7, title 2, of "an act to define and punish crimes in the District of Alaska, and to provide a code of criminal procedure for said district." 2nd. The facts stated in said indictment do not constitute a crime. (Tr. p. 12.) The demurrer was forthwith overruled. (Tr. pp. 9-10.)

On the 9th day of October, 1901, the prisoner entered his plea of "Not Guilty." (Tr. p. 10.)

On the 10th day of October, 1901, and immediately after the jury had been impaneled and sworn to try said cause, the prosecution caused to be sworn and placed upon the witness stand, Frank Johnson (Tr. p. 14). The witness was asked by Mr. McGinn, Acting United States District Attorney, in referring to the money loaned prisoner by Johnson:

" Q. State to the jury how you came to let him have it, and what he gave you as security? "

To the foregoing question prisoner's counsel objected, as assuming that there was a consideration, and as leading the witness. Objection was overruled and counsel for prisoner took exceptions. (Tr. p. 50.)

Again the witness Johnson was asked by the prosecution the following question:

" Q. What was the name signed to the check? " Counsel for prisoner objected on the ground that it was not the best evidence, and no foundation had been laid for secondary evidence. The objection was overruled and counsel for prisoner took an exception. (Tr. pp. 50-51.)

Johnson, when asked to examine the check, afterward read in evidence and marked Plff. Ex. "A," testified that he could not identify it. (Tr. p. 50.)

Mr. McGinn then offered said check in evidence. Counsel for prisoner strenuously objected to its admission, for the reason that there was absolutely no evidence tending to prove that it was the check described in the indictment, or that identified it with any check alleged to have been passed by the prisoner. The objection was overruled and counsel for prisoner took his exceptions. (Tr. pp. 51-52.)

At the close of the evidence for the prosecution, the prisoner, by his counsel, moved the Court to instruct the jury to return a verdict of not guilty, which was refused, and the prisoner excepted. (Tr. pp. 54-55.)

On the 11th day of October, 1901, counsel for prisoner moved the Court in arrest of judgment, which was refused, and defendant excepted. (Tr. p. 71.)

Immediately after motion in arrest of judgment was denied, the defendant moved the Court for a new trial, which was refused, and defendant excepted. (Tr. p. 72.)

The prisoner prior to the argument of the case to the jury, in writing requested the Court to instruct the jury, as set out in thirteen separate written instructions, then submitted. (Tr. p. 58.) The Court refused to give these instructions, or either of them, and the instructions subsequently given by the Court, failed to cover all the points upon which the prisoner had requested instruction. And again the instructions given by the Court on several material questions were erroneous and misleading, which will particularly appear in Specifications of Error. (Tr. p. 62.)

SPECIFICATION OF ERRORS RELIED UPON FOR REVERSAL.

I.

Error in overruling defendant's motion to quash the indictment.

II.

Error of the Court in overruling defendant's demurrer to the indictment.

III.

Error of the Court in overruling the objection of defendant to the question asked the witness Frank Johnson, on his direct examination, with reference to the money, witness lent defendant, as follows, to wit:

"Q. (Mr. McGINN)—State to the jury how you came to let him have it, and what he gave you as security?"

IV.

Error of the Court in overruling the objection of the defendant to the question asked the witness Frank Johnson, on his direct examination as follows, to wit:

"Q. (Mr. McGINN)—What was the name signed to the check?"

V.

Error of the Court in overruling the defendant's objection to the admission in evidence of the check and exhibit, marked "Plff. Ex. A" and allowing the same to be read to the jury.

VI.

Error of the Court in overruling the defendant's motion for a non-suit and that the jury be instructed to return a verdict of not guilty.

VII.

Error of the Court in overruling prisoner's motion in arrest of judgment.

ARGUMENT.

I.

The plaintiff in error alleges, as reasons for the first error specified, that no legally authorized term of court had been appointed, published or convened for or at Nome, at the time when the Grand Jury that indicted him was called, drawn or impaneled, or at the time when said indictment was presented or filed, or at the time he was arraigned; that at all of said dates and times Judge James Wickersham was attempting to hold the District Court, at a time and place unauthorized by law, and that therefore all proceedings before him were *coram non judice* and void.

We take it that a term of court may be defined to be a holding of a legally organized court at a certain time and place, within the jurisdiction of such court, theretofore duly appointed, and proclaimed by the Statutes or by some officer or officers by authority of and in compliance with such Statutes.

First it is essential to a legal term, that a definite, certain and invariable time and place be appointed. Second that such appointment and the proclamation and publication thereof be in the manner prescribed by law.

Section 4, Chapter 1, Title 1, of "an act making further provisions for a civil government for Alaska, and for other purposes, approved June 6, 1900, is as follows, to wit:

"District Court. There is hereby established a district court for the district, which shall be a court of general jurisdiction in civil, criminal, equity and admiralty causes,

and three district Judges shall be appointed for the district, who shall during their terms of office reside in the divisions of the district to which they may be respectively assigned by the President.

The court shall consist of three divisions. The judge designated to preside over division number one, shall, during his term of office, reside at Juneau, ad shall hold at least four terms of court in the district each year, two at Juneau, and two at Skagway, and the judge shall, as near January first as practicable, designate the time of holding the terms during the current year.

The judge designated to preside over division number two shall reside at St. Michaels during his term of office, and shall hold at least one term of court each year at St. Michaels in the district, beginning the third Monday in June.

The judge designated to preside over division number three shall reside at Eagle City during his term of office, and shall hold at least one term of court each year at Eagle City, in the district beginning on the first Monday in July.

Provided: The Attorney-General may for cause change the place of residence of the judge of either division of the Court.

Each of the judges is authorized and directed to hold such special terms of court as may be necessary for the public welfare, or for the dispatch of the business of the Court, at such times and places, in the district as they or any of them, respectively, may deem expedient, or as the Attorney-General may direct; and each shall have authority to employ interpreters, and to make allowances for the necessary expenses of his Court, and to employ an official court stenographer under the same terms and conditions, as are or may be provided for district courts of the United States.

"At least thirty days' notice shall be given by the judge or the clerk, of the time and place of holding special terms of the court."

It will be observed that the foregoing section requires a notice of the time and place of holding such special term, and that such notice shall be given for at least thirty days prior to the holding of such term.

By virtue of said act, Judge Arthur H. Noyes, District Judge of Alaska for the Second Division at Nome, on the 5th day of July, 1901, made an order appointing and fixing a special term of court to be held at Unalaska in said division on the 19th day of August, 1901, and in said order directed the clerk of the District Court at Nome to give notice of the time and place of holding such special term, using the following words, and figures, to wit:

"It is further ordered that the clerk of this court give immediate notice thereof, by posting at least three public notices, one to be posted at Nome; one to be posted at St. Michaels, and another to be posted at a prominent place in the said town of Unalaska, which notices shall be posted at least thirty days prior to the said 19th day of August, 1901." (Tr. p. 38.)

In obedience to the foregoing order, said clerk caused to be posted in the places designated in said order, notice of the holding of said term as directed, a portion of which notice in the following words and figures, to wit:

"A special term of the United States District Court for the District of Alaska, will be held at Unalaska in said district, to begin on the 19th day of August, 1901, and to continue for such time as there may be business there to transact." (Tr. p. 39.)

By virtue of said order and in consequence of the posting of said notice, solely, did any legal authority exist for the holding of said special term at Unalaska, and by the terms of said order and notice, its jurisdiction must be determined.

The order is specific and certain in designating Unalaska as the place of holding such term and the whole of such term and no authority can even be inferred for holding any part of said special term at any other place.

The notice in definite and positive language says "to continue for such time as there may be business *there* to transact."

If there is still any doubt as to the construction of said order and notice, then refer to the preface of said order, which is in the following words and figures:

"It appearing to the Court, that it is necessary to hold a special term thereof, for the discharge of the business of a distant portion of the district."

If no authority exists in said order and notice for the holding of said term at Nome, then by what legal authority was it held?

Said special term of court at Unalaska was convened at Unalaska on the 19th day of August, 1901, by Judge James Wickersham, District Judge for the Third Division. A grand and petit jury was there impaneled and sworn. The grand jury brought in indictments and the petit jury tried them.

Then the grand jury and petit jury impaneled for said term were discharged, and the following order was made:

"Good and sufficient cause appearing to the Court therefor, it is hereby ordered that the August, 1901, special term of this Court, beginning August 19th, 1901, and held at Unalaska in said district and division, be and the same is hereby adjourned to September 16th, 1901, at ten o'clock in the forenoon, to be then held at Nome, in said district and division.

"Done in open Court at Unalaska this 10th day of September, A. D. 1901. (Signed) James Wickersham, District Judge." (Tr. pp. 45-46.)

No notice of this order, other than filing the same in the clerk's office at Unalaska, was given, and no notice what-

ever of the holding of any term at Nome was given or posted.

On the 16th day of September, 1901, in pursuance of the intention expressed in the last named order, Judge Wickersham, without authority of law, attempted to convene and hold a term of the District Court at Nome. On the 21st day of September, 1901, without notice he caused to be drawn the names of twenty-three persons to serve as grand jurors at such alleged term, and on the 23rd day of September, 1901, said grand jury was impaneled and sworn. This was the grand jury that indicted the prisoner.

A judge has no authority to adjourn a lawful term of court, from a legally appointed place, to a place not legally appointed for the holding of said court.

If so, then any judge in said district could appear at St. Michaels on the third Monday in June, the time and place for holding the regular term in the second division,and immediately after convening said term, could adjourn to Nome, where immediately after his arrival he could convene said court, draw a grand and petit jury, and do other acts pertaining to a court before the citizens were aware of his presence, then such judge could immediately adjourn said term, again, from Nome to Unalaska, and so on indefinitely.

Why should Congress, in its statutes, provide a time certain for the holding of the regular term at St. Michaels, and why should it require so long a notice as thirty days to be given before the holding of a special term at any place, unless Congress believed it a right of every citizen to have full notice of the time and place where he may be called to answer criminal charges, or defend civil actions.

The law prescribing the manner of drawing juries in the district courts of the United States, requiring that all juries, both grand and petit, shall be drawn publicly and in

open court, would be a farce if a judge could appear in some place far district from that adjourned from and immediately and without notice open court and proceed to such drawing of a jury, when those most interested would probably be ignorant of the presence of such judge in the place.

Section 330, Chapter 34, of an Act entitled, "An Act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said district," provides that the magistrate holding a prisoner to answer must file in the court to which he is held, on or before the first day of the term, the warrant of his arrest, etc. Now, if he was held to appear before the special term at Unalaska, should not his warrant have been filed with that court on or before the 19th day of August, 1901, and should not the grand jury impaneled and discharged at Unalaska, have determined the charge?

Section 257, Chapter 29, of same Act provides that when a prisoner has been held to answer, and an indictment is not found against him at the next term of court, the court must order the prosecution dismissed.

After the grand jury at Unalaska was dismissed, should the court have ordered the prosecution dismissed? Most assuredly, unless it held that it was only appointed to try matters at Unalaska, and yet at an adjourned term of the same court, he was convicted.

The foregoing sections of the statute are referred to, to show how inconsistent such a procedure is with the statutory criminal procedure, and what a confusion it would cause. Even if Judge Wickersham's order of adjournment could be considered an appointment of a special term at Nome, still said term must fail because no notice of such adjournment was ever given, and by adjourning the court at Unalaska to convene at Nome five days thereafter he

made it absolutely impossible to give thirty days' notice as required by law.

In a district such as Alaska, where thousands of miles intervene between settlements, where newspapers and other means of publication are limited, where the mail service is dependent upon dog teams in the winter time, and small coasting vessels in the summer, and the telegraph is unknown, it seems that a longer notice and most diligent publication of the time and place of holding a special term should be required.

If the requirements of law can be avoided by adjourning terms of court from place to place, then the citizens of Alaska need never again expect to have notice of the time or place of the convention of a special term. In justice to Judge Wickersham we wish to say that his intentions in convening said court, were perfectly fair, but he was a stranger in our midst, and knew not of the many and bitter factional fights that made so difficult the selection of impartial juries. He was not aware that rumors of corruption in the drawing of grand juries on former occasions, had so terrified those charged with crime that they felt it necessary to their safety to be present at the selection of the grand and petit juries, in whose hands were their liberties.

We have argued this error *in extenso,* not because we doubted that the court would reverse the judgment on other errors herein, but because a decision on the point will decide the procedure of the district courts of Alaska in the future.

Numerous authorities could be cited which inferentially yet unmistakably support the foregoing contentions of plaintiff in error, but we consider it unnecessary as the following cases cited are directly in point, and have never been reversed or even adversely criticised by any court:

Northrup vs. People, 37 N. Y. 203.

In stating the case Judge Fullerton says:

"By Sec. 22, the judges of the Supreme Court of each district are required to appoint the times and places for holding courts within their respective districts. Sec. 24 provides, however, that the *places* appointed within the several counties for holding said courts should be those designated by statute for holding county or circuit courts."

By the same statute it is made necessary that these appointments thus made should be transmitted to the Secreary of State; and when received by that officer it became his duty to cause the same to be published in the State paper at least once a week for three successive weeks before the holding of any court in pursuance thereof. Under this authority the Justices of the Supreme Court of the second district, in November, 1865, at a meeting for that purpose, designated and appointed *White Plains* as the place for holding the circuit courts and courts of oyer and terminer for Westchester County, for the years 1866 and 1867, but omitted so to designate *"Bedford;"* and further, in the opinion the court says: "In pursuance of this appointment a court of oyer and terminer convened at White Plains, in December, 1866, and for some reason, not disclosed in the case, was adjourned to the 14th day of January, next following, at the Court-house in *Bedford.* At such adjourned term the plaintiff in error was tried and convicted, etc., 'XXX (p. 204).' Before the trial the prisoner's counsel objected to proceeding therewith, on the grounds, that the adjournment from White Plains to Bedford was unauthorized, and this presents the only important question in the case." (p. 205.)

"The policy of the law is to inspire confidence in the ad-
"ministration of justice. It is the right of every citizen
"to know the times and places for holding the courts,

"where his liberty or property may be put in jeopardy, "that would be lax system, indeed, which would leave them "the subjects of sudden and perhaps capricious changes." (XXX.) "To sanction the court at which the prisoner "was convicted, is to annul entirely all these provisions." (p. 206.)

"The adjournment of the oyer and terminer to Bed- "ford was not, *ipso facto,* an appointment of that place for "holding the court, within the meaning of the statute. It "still would be necessary to transmit the appointment "to the State department, and have the same published "according to law. These provisions of the statute cannot "all be regarded as merely directory." (p. 207.)

In People vs. Nugent, decided by the Appellate Division of the Supreme Court of the State of New York, Fourth Department, at the January term, 1901, reported in 57 App. Div. 542, it is held that an indictment found at a term of which due publication is not made, is not valid, and should be quashed.

Judge Williams, in delivering the opinion of the court in the foregoing case (People vs. Nugent), says: "The Northrup case seems to be an authority directly upon the point we are considering, and never to have been overruled or criticised even. In a case of this kind, it would be an unsafe rule to hold that a county judge, who has the sole power and authority to appoint the times for holding county courts should be permitted to appoint and hold such courts, at his own will, disregarding the statute, and making appointments for such times as to render a compliance with the statute as to publishing the order impossible. Such a rule would enable a county judge, in times of public excitement, to call a term of his court into existence without any notice to persons charged with crime, and thus seriously interfere with their rights under the Constitution and laws of the State."

II.

THE COURT COMMITTED ERROR IN OVERRULING DEFENDANT'S DEMURRER TO THE INDICTMENT.

The indictment fails to charge the crime of uttering and publishing a forged instrument in that it fails to charge that said alleged forged instrument was so uttered and published with intent to injure or defraud.

That it was uttered and published with intent to injure or defraud is essential to the crime. (Sec. 77, Ch. 4, Crim. Code, Alaska.)

It is true that in a paragraph subsequent to the charge, the following language is used: "He, the said Guy N. Stockslager, then and there well knowing the same to be false and forged with intent to injure and defraud, etc."

Even if this could be considered as a part of the indictment, still it can only be construed to mean that the defendant knew that said instrument had been forged for the purpose of defrauding some one.

Said indictment does not conform to the requirements of Ch. 7, of Tl. 2 of the Code of Criminal Procedure for Alaska.

Sec. 40, Ch. 7, Cr. Code, Alaska, is as follows: "Manner of stating act constituting the crime, as set forth in the appendix to this Act, is sufficient in all cases where the forms there given are applicable, and in other cases forms may be used as nearly similar as the nature of the case will permit."

It is true that this may be merely directory, but it assists us in construing the language of the indictment.

In the appendix is found the following form for forgery: "Forged (or falsely made, uttered or counterfeited, or as

the case may be), an instrument purporting to be or being, the last will and testament of C. D., devising certain property with intent to defraud or injure."

Now, had the indictment substantially conformed to this form, and have alleged, that the said Guy N. Stockslager, with intent to injure or defraud, did, knowingly and feloniously utter, etc., the crime under the statute would have been charged.

The indictment in violation of the requirements of Sec. 43 of said Chapter 7, charges both an intent to injure and an intent to defraud, if it charges at all, in the conjunctive instead of the alternative. It will be noticed also that the form in the appendix alleges the intent to injure or defraud in the alternative.

III.

ERROR OF THE COURT IN ALLOWING THE DISTRICT ATTORNEY TO ASK LEADING QUESTIONS OF HIS WITNESS, FRANK JOHNSON.

Mr. Frank Johnson, the first witness for the United States, on his direct examination, after testifying that he lent Stockslager money, was asked by the District Attorney the following question:

"Q. (Mr. McGINN) State to the jury how you came to let him have it, and what he gave you as security?" (Tr. p. 50.)

As there was no evidence that any security was required, we contend that the question was not only leading but assumed testimony that had not been given. At this time, as will appear from the transcript, the check set out in the indictment had not been produced, which was also grounds for objection.

IV.

ERROR OF THE COURT IN ADMITTING SECONDARY EVIDENCE TO PROVE THE CONTENTS OF THE CHECK.

Frank Johnson, on his direct examination, was asked by the District Attorney:

"Q. (Mr. McGINN) What was the name signed to the check?"

Counsel for the defendant objected and argued to the Court, that the original check alleged to have been uttered by the defendant must be in the possession of the prosecution, or if lost no proper foundation had been laid to introduce secondary evidence; that the check was the best evidence, but the objection was overruled and the witness answered as follows:

"A. (FRANK JOHNSON) Mr. Whitehead's name, I believe, was signed to it."

At this time no check had been produced. (Tr. pp. 50-51.)

V.

THE COURT ERRED IN ADMITTING THE CHECK MARKED "PLFF EX. A" IN EVIDENCE AND ALLOWING THE SAME TO BE READ TO THE JURY.

This check was admitted in evidence while Frank Johnson, the first witness for the United States, was upon the stand, and before the testimony of any other witness had been heard. (Tr. p. 52.)

Frank Johnson was the person to whom, so the indictment alleges, the prisoner uttered said alleged forged check.

After improperly attempting to prove that there was a consideration for a check before any check was proven, the District Attorney produced the writing or check afterwards introduced in evidence and marked "Plff. Ex. A," and presented it to Frank Johnson for his examination, at the same time asking the said Frank Johnson the following question:

"Q. (Mr. McGINN) I will ask you to examine this paper. Is that the check?" (Tr. p. 50.)

To this question Mr. Johnson, after carefully examining the paper, made the following answer:

"A. (Mr. JOHSON) I could not swear to it." (Tr. p. 50.)

Then Mr. McGinn attempted to identify the instrument as the check alleged in the indictment by attempting to prove the contents of some check which Mr. Johnson testified had once been left in his possession by the prisoner, which the Court permitted over the objection of counsel for prisoner. While pursuing this character of examination, the District Attorney asked Mr. Johnson the following question:

"Q. (Mr. McGINN) What was the name which appeared on the back of the check?" (Tr. p. 51.)

And Mr. Johnson answered as follows:

"A. (Mr. JOHNSON) I did not pay much attention to it; I gave it hardly a thought." (Tr. p. 51.)

The last question and answer should satisfy any one that Mr. Johnson remembered little about the check given to him some two months before, and whether the one presented him was the same he did not know.

Again Mr. McGinn in the hopes that the witness might stretch his imagination and prove the check asks Mr. Johnson the following question:

"Q. (Mr. McGINN) I will ask you whether or not this is the same check?"

To which Mr. Johnson answered as follows:

"A. (Mr. JOHNSON) Well, I have already stated that I could not say positively." (Tr. p. 51.)

The foregoing questions and answers include all the testimony relative to the said check, and are so plain, definite and certain that argument as to their meaning and effect seems unnecessary. (Johnson's test. Tr. pp. 49-52.)

The last answer was the last testimony relative to said check, after which Mr. McGinn offered the same in evidence. Counsel for the prisoner objected, but his objection was overruled and the check was then admitted in evidence and marked "Plff Ex. A."

This error alone was fatal to the case of the United States. The checked alleged to have been uttered to Frank Johnson is set out in the indictment in full, verbatim et literatim. The positive proof by direct evidence, of the check is essential to the corpus delicti, and no other evidence can be legally received, touching the other elements of the crime charged or for the purpose of proving the agency of any person, until such proof is made.

Abbott's Trial Brief—Criminal Causes, page 306, section 528, states the rule as follows: "Identification of the person or property injured is an essential part of the requisite proof of the corpus delicti, within the rule as to order of proof, when the allegations of the indictment, make such identity part of the offense charged. Otherwise not."

People vs. Palmer, 109 N. Y. 111.
Comm vs. Webster, 52 Am. Dec. 711.

VI.

Error was committed by the Trial Court in not instructing the jury to return a verdict of not guilty.

Immediately after all the evidence for the United States had been introduced, and after Mr. McGinn, Assistant District Attorney for Alaska, had announced the case on behalf of the United States closed, and before any evidence was submitted on behalf of the prisoner, counsel for defendant moved the Court to instruct the jury to return a verdict of "not guilty." Which motion after argument by counsel was overruled, and defendant was compelled to proceed with the trial (Tr. p. 54). Only three witnesses were produced and testified on behalf of the United States, viz., Frank Johnson, W. H. Merril and Cabell Whitehead, therefore it becomes only necessary to examine their testimony in determining whether the Court erred in refusing to instruct a verdict.

It is very difficult to prevent a jury from considering any evidence that may come to its knowledge, but a court in arriving at a decision on any matter submitted exclusively to it, should only consider competent and legal evidence. If such is the rule then the Court should have disregarded all that portion of Frank Johnson's testimony attempting to fix the crime charged upon the prisoner, for the reason that said evidence was incompetent until proof had been made that a crime had been committed as argued in Paragraph V of this argument.

Also the Court should have disregarded all that portion of Johnson's testimony relative to the contents of the check passed to him, as not the best evidence.

Eliminating such portions of Johnson's testimony, and all that remains, is his testimony as to the identity of the check introduced in evidence and marked "Plff Ex. A," which testimony absolutely fails to identify said check (Tr. pp. 49-52).

Following the same rule the Court would be compelled to disregard said check as evidence, although it had been

admitted in evidence, for the reason that there was no evidence tending to identify it.

But for the sake of argument, admit that the Court could consider all of Johnson's testimony. Mr. Johnson testified that a check was delivered to him by the prisoner, but he does not say it was the check described in the indictment or the check admitted in evidence. He says the check was signed by Cabell Whitehead, was for the sum of one hundred dollars, and was drawn upon the Alaska Banking and Safe Deposit Company, but he does not say that it was dated at Nome City, Alaska, July 26th, 1901, nor does he testify that it was made payable to Guy N. Stockslager, nor does he testify that it was endorsed by Guy N. Stockslager, as was the check alleged and set out in the indictment. (Tr. p. 7.)

Thus, if secondary evidence had been competent, still the proof was absolutely wanting as to the identity of the check.

In United States v. Howard, 3 Sumner, 12, the rule is laid down that no allegation, whether it be necessary or unnecessary, more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can be rejected as surplusage, and illustrates the rule, as follows:

"On the other hand, if a man should be charged with stealing a black horse, the allegation of color, although unnecessary, yet being descriptive of that which is material, could not be rejected as surplusage."

In the United States v. Keen, 1 McLean, it is held: That if words are used as descriptive of the instrument, though they might have been omitted, yet, being stated, must be proved; the court saying:

"It was unnecessary to allege by whom the draft was drawn, as the Court has already stated, but having made the allegation it cannot be disregarded." (p. 440.)

See also

United States v. Lancaster, 2 McLean, 431.

State v. Newland, 7 Ia. 242.

In United States v. Brown, 3 McLean, 233, the Court holds—

"Where the prosecutor states the offense with greater particularity than he is bound to do, the proof must correspond with the averments."

Mr. W. H. Merril, the second witness for the United States, after testifying that he had been cashier of the bank for a little over a year, was asked the following questions by Mr. McGinn:—

"Q. (Mr. McGINN.) I will ask you to examine this paper (Plaintiff's Ex. 'A') and state whether or not you have ever seen it before?"

To which Mr. Merril answered as follows:

"A. (Mr. MERRIL.) I have no doubt that it is the one handed me before."

"Q. (Mr. McGINN.) By whom was it presented to you?

"A. (Mr. MERRIL.) I could not identify the person.

"Q. (Mr. McGINN.) Do you know whether Frank Johnson presented this check to you?

"A. (Mr. MERRIL.) I do not know. * * * Dr. Whitehead came in and I had nothing more to do with it."

The foregoing is the full substance of W. H. Merril's testimony. (Tr. pp. 52-53.)

Does it in any way identify "Plff Ex. A" with the check alleged in the indictment? He does not even swear positively that said check is the one formerly handed to him, but his language can only be construed to mean that he has no reason to doubt that it is a check formerly presented to him for his inspection. He has not the faintest recollection of who handed him the check; he does not testify when or on what date it was handed him. He does not know,

even, what became of the check. Is there anything in this testimony to identify said check marked "Plff Ex. A" as the check alleged to have been uttered by the prisoner to Frank Johnson, or even to prove that said check marked "Plff Ex. A" was ever uttered by the prisoner? Such is the testimony of the second witness.

The testimony of Cabell Whitehead, the third and last witness for the United States, is so short, that we may set it out in full.

"(CABELL WHITEHEAD.) My name is Cabell Whitehead. I reside at Nome. I am now, and have been for two seasons, manager of the Alaska Banking and Safe Deposit Company.

"Q. (By Mr. McGINN.) I'll ask you to examine Plaintiff's Exhibit 'A.' Is that your signature?

"A. It is not.

"Q. I will ask you to examine Plaintiff's Exhibit 'A,' and state whether or not that is his signature on the back?

"A. In my opinion it is.

"Q. Did you give any person authority to sign your name to that check?

"A. I did not.

"(Mr. WHITEHEAD.) I knew the defendant Guy N. Stockslager seven or eight years ago in Washington, D. C." Tr. p. 54.)

The foregoing testimony of Cabell Whitehead proves the check introduced in evidence and marked "Plff Ex. A," a forgery. His opinion as to the signature on the back of said check might have tended to prove that some certain person whom he knows, forged the instrument, if he had properly qualified himself to give such an opinion. It nowhere appears from the evidence that he ever saw the signature of Guy N. Stockslager and his opinion was probably formed from the fact that the prisoner was charged

with forgery and the further fact that his name was written on the back. He does not testify that the body of said check is in the handwriting of Guy N. Stockslager.

But for the sake of argument, admit that it is proved by Whitehead's testimony that the prisoner actually forged said check, still he cannot be found guilty for he is not charged in the indictment with forging the instrument, but with uttering and publishing, to Frank Johnson, a forged check. Said exhibit may be an instrument forged by the prisoner and uttered and published by some one else, or said exhibit could even be a check forged by the prisoner and by him uttered to some one else other than Frank Johnson and on a different date, but the essential question is, is the exhibit, introduced in evidence,the identical check set out in the indictment, and was it uttered and published by the prisoner to Frank Johnson?

Mr. Whitehead does not know where the check marked "Plff Ex. A" came from, or at least his testimony is silent on the subject. His testimony neither connects the said exhibit with the prisoner nor with Frank Johnson. This ends the testimony.

To sum it all up, it amounts to simply this: Johnson testified that the prisoner left a check with him, which check was not paid, Johnson does not recognize "Plff Ex. A," as said check. Merril has no doubt that "Plff Ex. A" is the same that has been handed to him before, and believes it is a forgery. He does not say by whom handed to him, where or at what time. He does not know where "Plff Ex. A" came from, or where it went to. Mr. Whitehead's testimony is that "Plff Ex. A" is a forgery; that the signature on the back is "HIS" and possibly may mean Stockslager's, in his opinion. His testimony is silent as to whether he ever saw or knew of "Plff Ex. A," prior to the time it was presented to him on the trial.

There is absolutely no evidence identifying the check introduced in evidence and marked "Plff's Ex. A" as the check in the indictment alleged to have been uttered to Frank Johnson by the prisoner.

There is a total failure of proof as to the instrument in the indictment alleged to be a forgery and to have been uttered by the prisoner.

It would be impossible to prove an instrument a forgery until the instrument was identified, and evidence of the uttering of an instrument not proved to be false and forged would be immaterial, therefore, as a matter of law, there was nothing for the jury to consider.

This was purely a question of law that could only be determined by the Court.

It is the duty of the Court where there is a failure of proof as to an essential allegation of the indictment, to instruct the jury to render a verdict of "Not Guilty."

In Patton vs. Texas and Pacific Ry. Co., 179 U. S. 658, the Court says: "It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact, and that ordinarily negligence is so far a question of fact as to be properly submitted to, and determined by, them.

"Hence it is that seldom an Appellate Court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time the Judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility." (p. 660.)

If such is the rule in a civil suit, then how much more strongly it should apply in criminal actions.

"And the State has no right to put him to the peril of a

trial, when its own Court says that there is no sufficient evidence of his guilt." (p. 621.)

William Howell vs. People, 5 Hun. (N. Y.) 621.

"I can see no reason therefore why the Court may not in a case presenting a question of law only, instruct the jury to acquit the prisoner, or to direct an acquittal, and enforce the direction, nor why it is not the duty of the Court to do so.

"This results from the rule that the jury must take the law as adjudged by the Court, and I think it is a necessary result. It follows, that a refusal to give such instructions or direction in a proper case is error." (p. 141.)

People vs. Bennett, 49 N. Y. 137.

"If the prosecution leaves some element necessary to constitute the crime entirely unproved, it is a clear case for the interposition of a Court." (p. 142.)

People vs. Bennett.

"If there is no evidence to show the commission of a crime, or if it is plainly insufficient to justify a verdict, it is the duty of the Court to so declare."

State vs. Smith, 28 Ia. 565.

State vs. Daubert, 42 Mo. 242.

In United States vs. William Fullerton, 7 Blatchford, 177, upon the close of the testimony, defendant moved the Court to instruct the jury to return a verdict of not guilty, on the grounds that evidence was insufficient to warrant a conviction, upon which motion the action of the Court is reported as follows:

"The Court after hearing a discussion by the respective counsel as to the power of the Court to give such an instruction in any case, and thus take the case from the jury, held that inasmuch as the Court would have the power, if the defendant were convicted by the jury on the evidence, to grant him a new trial, if it should be of opinion that the verdict was against the evidence, it had the power, if it was of the opinion that a verdict of guilty would not be

warranted by the evidence, to direct the jury to acquit the defendant on that ground. The Court being of opinion that the evidence did not warrant a conviction, directed the jury to acquit the defendant, which was done."

Again the following has been stated as the rule:

"In a criminal case a mere scintilla of evidence, or even some proof, is not sufficient to require the submission of the case to the jury; but where it is clear that the proof is insufficient to overcome the presumption of innocence, and show guilt beyond a reasonable doubt, the defendant is entitled to an acquittal, and it is error to refuse to direct the jury to acquit."

People vs. Anderson (N. Y.) 46 N. E. 1046.

State vs. Hayden, 52 Howard's Prac. 471.

Counsel for the prisoner earnestly sought to apprise the trial court of all the facts and law upon which each objection was based. The motion to quash the indictment was made and argued prior to the prisoner's plea, and while the Grand Jury that returned such indictment was still in session. Subsequent to the trial, counsel for the prisoner, in a motion in arrest of judgment, again argued to the Court the law and facts urged in support of the motion to quash, and in the motion for a new trial reviewed before the Court every alleged error at the trial.

Though the argument may be considered technical, yet it is in defense of that wise, just and unvarying principle, that one charged with crime is presumed to be innocent until proven guilty, and that he shall not be compelled to submit to the peril of a trial before men unskilled in the law until that presumption is rebutted by competent evidence.

Again it is justified by the infringement of trial courts on that most sacred right of prisoners, to receive the protection of, and be surrounded by all those rules and safe-

guards provided by law to insure fair and impartial trials and to protect the life and liberty of American citizens against spite, hatred and conspiracy.

Respectfully submitted,

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